No. 17783
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALCUIN WILLENBRING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant United States Attorney,
Chief, Criminal Section,

RICHARD A. MURPHY,
Assistant United States Attorney,
Assistant Chief, Criminal Section,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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ALCUIN WILLENBRING,

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

On February 15, 1961, the Federal Grand Jury in and for the Central Division of the Southern District of California returned a two-count indictment charging appellant Alcuin Willenbring with violation of Section 7201 of Title 26, United States Code, for the calendar years 1954 and 1955 [C. T. 2].[1]

On December 1, 1961, after trial by jury Alcuin Willenbring was found guilty on each count of the indictment [C. T. 65]. On December 8, 1961, sentence was imposed. Appellant was committed to the custody of the Attorney General for a period of four years on each count, such sentences to run concurrently. Ap-

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[1]C. T. refers to Clerk's Transcript of Record.

pellant was also fined in the amount of $5,000 on each of the two counts, a total of $10,000 [C. T. 69].

The jurisdiction of the United States District Court was predicated upon Sections 3231 of Title 18, United States Code and Section 7201 of Title 26, United States Code. Jurisdiction of this court rests pursuant to Sections 1291 and 1294 of Title 28, United States Code.

II.
STATUTE INVOLVED.

Appellant asserts no error in the trial of his case in the District Court, but alleges as error the failure of the trial judge to disqualify himself upon the filing by Appellant of an affidavit of personal bias pursuant to Section 144 of Title 28, United States Code, which section provides as follows:

> "§144. *Bias or prejudice of judge*
>
> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may

file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Section 144 of Title 28, United States Code, is based upon Section 21 of the Judicial Code of the United States, January 1, 1912. Section 21 of the Judicial Code of the United States provides as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

III.
STATEMENT OF THE CASE.

On February 15, 1961, the Federal Grand Jury for the Central Division of the Southern District of California returned a two-count indictment charging appellant Alcuin Willenbring with violations of Section 7201 of Title 26, United States Code, for the calendar years 1954 and 1955 [C. T. 2].

On November 21, 1961, the first day of trial before the Honorable Gus J. Solomon [R. T. 2][2] appellant filed a notice and motion for transfer of case for trial back to the Honorable Wm. M. Byrne [C. T. 66]. This motion was based on appellant Alcuin Willenbring's affidavit of bias and his attorney's certificate pursuant to Section 144 of Title 28, United States Code.

The Honorable Gus J. Solomon denied appellant's motion on the grounds that the affidavit on its face showed that it was not timely filed [R. T. 4, lines 9 and 10] and that the affidavit was insufficient [R. T. 4, line 25].

Thereaftei appellant was tried by jury, convicted and sentenced [C. T. 69]. Appellant filed a timely notice of appeal [C. T. 70] and here questions the ruling by the Honorable Gus J. Solomon on appellant's affidavit of bias.

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[2]R. T. refers to Reporter's Transcript of Record.

IV.
STATEMENT OF FACTS.

On the morning of November 21, 1961, the first day of his income tax evasion trial, the appellant, Alcuin Willenbring, through his counsel, Leonard B. Hankins. filed with the trial court, Judge Gus J. Solomon, an affidavit of bias [R. T. 2]. The affidavit declared in pertinent part as follows [C. T. 66]:

> "2. That upon information and belief, the affiant states as follows: That on February 17, 1961, the United States Attorneys Office called the affiant's Attorney, Leonard B. Hankins and advised him that the case had just been transferred to the Honorable Gus Solomon, Judge of the District Court for trial; that thereafter the affiant's attorney has had two conferences with the Honorable Gus Solomon at which agents for the government and the Assistant United States Attorney were present; that further upon information and belief the affiant states that the Honorable Judge Solomon had a conference with the Assistant United States Attorney regarding this case without the affiant's attorney being present; that further upon information and belief the affiant believes that the Honorable Gus Solomon has already made up his mind that the defendant is guilty without hearing all of the evidence of the case; and that further upon information and belief the affiant states that the Honorable Gus Solomon has a personal bias or prejudice against the affiant and that the said Honorable Gus Solomon should proceed no further therein, but that the matter should be transferred to another judge to hear the proceedings; . . ."

Thereafter in open court the following colloquy took place between Leonard B. Hankins, Esq., and the Honorable Gus J. Solomon:

"Have you anything to say to supplement the affidavit?

Mr. Hankins: The only thing I would like the record to show, your Honor, is that we have had two conferences, I believe, with your Honor. One last Saturday morning and one Monday at 2:00 o'clock in your chambers, in which the United States Attorney was present, and one on which the defendant was present, that is, on Monday afternoon; that as a result of my discussion with him of what has transpired, and his being present and knowing what has transpired, he feels that he should, under the Code section, file the Affidavit of Bias, under 20 USC 444, and request the court to disqualify itself in this matter.

And as a result of that we have then filed the affidavit of bias and prejudice for Mr. Willenbring, as required under the Code section of the attorneys of record of the defendant, filed with the court; and inasmuch as there is no set procedure set out in the Code for moving the court in connection with this section, we have filed what we have entitled Notice of Motion for Transfer of the case for trial back to Honorable William Byrne, so we supplemented that with our motion.

And we request the court at this time to disqualify himself under this section and transfer the case back to the presiding judge, or to another judge.

The Court: Mr. Hankins, as I told you earlier, the motion was denied." [R. T. 2, line 21, to p. 3, line 20].

The court ruled in denying appellant's motion to transfer that the affidavit of bias was not timely filed [R. T. 4, lines 9 and 10] and insufficient [R. T. 4, line 25].

Thereafter the jury trial took place and appellant was found guilty and sentenced. Appellant found no error in these proceedings.

V.
ARGUMENT.

The Trial Court Did Not Err in Its Ruling on Appellant's Affidavit of Bias Filed Pursuant to Section 144 of Title 28, United States Code.

Discussion of the law applicable to affidavits of bias is contained in *Green v. Murphy,* 259 F. 2d 591 (3d Cir. 1958), at p. 593:

> "We are of the opinion that the case at bar is ruled by legal principles which, although they may have been cloudy in the past, are now clearly defined. It is now settled law that the judge against whom an affidavit of bias and prejudice is filed under Section 144, must himself pass on the legal sufficiency of the facts alleged and that in so doing he must accept the allegations of the affidavit as true. A United States district judge therefore possesses the jurisdiction, the power, to pass upon the question as to whether he must withdraw from the case by reason of the allegations of his disqualification contained in the affidavit. This necessarily includes the power to decide the question wrongly as well as rightly. Behr v. Mine Safety Appliances Co., 3 Cir., 233 F. 2d 371, certiorari denied 1956, 352 U. S. 942, 77 S. Ct.

> 264, 1 L. Ed. 2d 237, rehearing denied 1957, 352 U. S. 976, 77 S. Ct. 353, 1 L. Ed. 2d 329; In re Greene, 3 Cir., 1947, 160 F. 2d 517, 518; Voltmann v. United States Fruit Co., 2 Cir., 1945, 147 F. 2d 514, 517. Only what is set forth in the affidavit of bias and prejudice is material to the issue of disqualification. Berger v. United States, 1920, 255 U. S. 22, 41 S. Ct. 230, 65 L. Ed. 481. It follows, therefore, that only questions of law are presented by the respondent judge's refusal to disqualify himself. There can be no dispute either in the district court or on appeal as to the truth or falsity of the allegations of the affidavit. . . ."

The judge, before whom the case is pending and against whom the affidavit of bias is filed, must consider for the purpose of passing on the sufficiency and timeliness of the affidavit of bias that all of the allegations of the affidavit are true. Accordingly for the purpose of this appeal the affidavit must be considered in a similar light to determine whether or not the court committed error in denying the relief sought based upon the affidavit.

With merely the question of sufficiency and timeliness in issue, it is unnecessary to go outside of the record as appellant in his brief chooses to do or to call to the court's attention the fact that no error is alleged to have occurred in the trial of this case.

Section 144 of Title 28, United States Code, requires that the affidavit of bias shall state the facts and reasons for the belief that bias or prejudice exists. Paragraph 1 of the affidavit of bias submitted by the appellant [C. T. 66, p. 1, line 24, to p. 2, line 7]

is a statement of preliminary matter not addressed to personal bias or prejudice of Judge Solomon. If the affidavit is sufficient it must rely upon the allegations set forth in paragraph 2 of the affidavit [C. T. 66, p. 2, line 8 to line 23]. In paragraph 2 of the affidavit the appellant states that Judge Solomon had a personal bias or prejudice against him [C. T. 66, p. 2, lines 20-23]. Section 144 requires more than the mere statement. The plain, clear language of the statute requires "the affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, . . ." The allegations "that on February 17, 1961, the United States Attorney's Office called the affiant's attorney, Leonard B. Hankins, and advised him that the case had just been transferred to the Honorable Gus Solomon, Judge of the District Court for trial"; and "that thereafter the affiant's attorney has had two conferences with the Honorable Gus Solomon at which agents for the Government and the Assistant United States Attorney were present" taken separately or together with the entire affidavit, by no stretch of the imagination, imply or support the bare conclusion of personal bias or prejudice against the appellant on the part of the Honorable Gus J. Solomon.

The allegation "that further upon information and belief the affiant states that the Honorable Judge Solomon had a conference with the Assistant United States Attorney regarding this case without the affiant's attorney being present" even when considered for the purpose of the appeal as true, does not support the proposition that the trial judge was personally biased or prejudiced against the defendant. It should be noted that the appellant does not suggest or imply even on

information and belief that any improper conduct took place or that the merits of the case were discussed. Clearly such an allegation by itself or when considered with earlier allegations contained in the affidavit, is insufficient to support the proposition that Judge Solomon was personally biased or prejudiced.

Finally, the allegation "that further upon information and belief the affiant believes that the Honorable Gus Solomon has already made up his mind that the defendant is guilty without hearing all of the evidence of the case"; fails to assert any reason or fact for the bare conclusion. This allegation is not supported by any statements or actions attributed to Judge Solomon which might imply or give rise to such belief.

If the mere statement of a naked belief by the defendant that the trial judge was personally biased against him was sufficient under Section 144, the opportunity for unfettered court shopping by defendants would clearly create an abuse of the privilege for which this remedial statute is created. *Henry v. Speer,* 201 Fed 869 (5th Cir. 1913).

In ruling on a similar affidavit, this court in *Williams v. Pierce County Board of Commissioners,* 267 F. 2d 966 (9th Cir. 1959), stated at page 867:

> "Appellant asserts error of the trial judge in failing to disqualify himself after an affidavit had been filed by plaintiff charging the judge with bias. The affidavit stated no facts showing bias. Its conclusions of bias and prejudice were properly disregarded by the judge. Title 28, U.S.C.A .§ 144; Scott v. Beam, 10th Cir., 122 F. 2d 777, 788."

In *Scott v. Beam,* 122 F. 2d 777 (10th Cir. 1941), cited above with approval by the United States Court of Appeals for the Ninth Circuit, the court in ruling on a similar affidavit stated at page 778: "The statement that the Assistant United States Attorney conferred with the judge during the absence of other attorneys in the case of itself was not a fact showing bias and prejudice."

An earlier ruling by this court in *Wilkes v. United States,* 80 F. 2d 285 (9th Cir. 1935) is helpful in describing the test for sufficiency, at page 289:

> "To satisfy the requirements of section 21, the facts stated in the affidavit 'must give fair support to the charge of a bend of mind that may prevent or impede impartiality of judgment.' Berger v. United States, 255 U. S. 22, 23, 41 S. Ct. 230, 233, 65 L. Ed. 481. The affidavit must 'assert facts from which a sane and reasonable mind may fairly infer bias or prejudice.' Keown v. Hughes (C. C. A.) 265 F. 572, 577. These facts 'should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading.' Morse v. Lewis (C. C. A.) 54 F. 2d 1027, 1032."

Appellant's affidavit is in the light of the test described above patently insufficient.

It would appear that appellant himself at this late date recognizes the insufficiency of the affidavit since in his brief he makes new and additional allegations not contained in the affidavit upon which the trial

court based its ruling, here appealed. These new and additional allegations are outside the record which appellant designated and these new allegations are not for the purpose of this appeal, testing the sufficiency of the affidavit, entitled to be considered as true as are the allegations contained in the affidavit.

Appellant states in his brief at page 5:

> "The pre-trial conference was continued on November 20, 1961, with counsel for both parties and appellant in attendance. During the course of this conference Judge Solomon stated directly to appellant, 'You are the one that is going to the penitentiary.' [TR 2 and 3]"

Appellant is not supported by the record in the statement he attributes to Judge Solomon. It should also be noted that such a statement was not offered in response to the court's invitation to counsel to supplement the record on November 21, 1961 [R. T. 2, line 21, to p. 3, line 20]:

> "Have you anything to say to supplement the affidavit?
>
> Mr. Hankins: The only thing I would like the record to show, your Honor, is that we have had two conferences, I believe, with your Honor. One last Saturday morning and one Monday at 2:00 o'clock in your chambers, in which the United States Attorney was present, and one on which the defendant was present, that is, on Monday afternoon; that as a result of my discussion with him of what has transpired, and his being present and knowing what has transpired, he feels that he should, under the Code section, file the Affi-

davit of Bias, under 20 USC 444, and request the court to disqualify itself in this matter.

And as a result of that we have then filed the affidavit of bias and prejudice for Mr. Willenbring, as required under the Code section of the attorneys of record of the defendant, filed with the court; and inasmuch as there is no set procedure set out in the Code for moving the court in connection with this section, we have filed what we have entitled notice of Motion for Transfer of the case for trial back to Honorable William Byrne, so we supplemented that with our motion.

And we request the court at this time to disqualify himself under this section and transfer the case back to the presiding judge, or to another judge.

The Court: Mr. Hankins, as I told you earlier, the motion was denied."

The allegations on information and belief made in the affidavit in the light of the statements of counsel as set forth above should have complied with the tests set forth in *Johnson v. United States,* 35 F. 2d 355 (D. C. W. D. Wash. 1929) at page 357:

"In the last analysis, the statute involved is not concerned with the actual state of mind of the judge or litigant, but only with what the latter is willing to incorporate in an affidavit and counsel to indorse. However false, there can be no denial, but the charge of personal bias or prejudice must be accepted as true. To avoid abuses, the law requires that the affidavit be of legal sufficiency. That is, that the charge be of *personal* bias or

> prejudice, that the facts and reasons for the charge be set out and give fair support to the accusation, and that upon its face the affidavit presents evidence of good faith. To that end mere rumors, gossip, general statements that affiant by some person is informed and believes that at some time, some place, some occasion, the judge expressed sentiments manifesting bias or prejudice, are not enough, but informant, and time, place, occasion of, and the judge's expressions, and that the bias or prejudice is *personal*, all must be set out in the affidavit. . . ."

The affiant is silent as to time, place, facts and reasons for the conclusions set forth in his affidavit. Accordingly it is impossible to ascertain whether good cause existed for the filing of the affidavit on the morning of trial rather than on November 17, 1961, or during the intervening days. The affidavit is insufficient in this respect.

In *In re Union Leader Corporation,* 292 F. 2d 381 (1st Cir. 1961), cert. denied 368 U. S. 927, the court made this observation which here seems appropriate:

> "In sum, a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary. This is not an undue requirement. If a party cannot present a sufficient affidavit indicating possible bias, he will still have protection if bias or prejudice appear in fact during the course of the trial. Compare Knapp v. Kinsey, 6 Cir., 1956, 232 F. 2d 458, with Killilea v. United States, 1 Cir., 1961, 287 F. 2d 212, certiorari denied 81 S. Ct. 1933."

In fairness to the trial court it should be pointed out that Judge Solomon, when confronted with the affidavit, recessed the court and conferred with Honorable Wm. M. Byrne prior to ruling on the sufficiency of the affidavit [R. T. 2], thereby demonstrating laudable impartiality and fair consideration of the affidavit prior to ruling. The trial which followed was without asserted error.

VI.
CONCLUSION.

There being no error, the judgment should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant United States Attorney,
Chief, Criminal Section,

RICHARD A. MURPHY,
Assistant United States Attorney,
Assistant Chief, Criminal Section,

Attorneys for Appellee United States of America.

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APPELLANT'S REPLY BRIEF

LEONARD B. HANKINS
and JAMES L. HAY
4014 Long Beach Blvd.
Long Beach 7, California

Attorneys for Appellant.

Harrison-Hartford, Inc., Beverly Hills, California • BRadshaw 2-7888

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APPELLANT'S REPLY BRIEF

ARGUMENT

In its Brief on Page eight, the Third Paragraph, the Appellee states, "With merely the question of sufficiency and timeliness in issue, ..." and thereafter discusses at length the sufficiency of the affidavit in question on this appeal. However, Appellee does not further discuss the timeliness of said affidavit except to allege on Page Fourteen, Second Paragraph, that, "....it is impossible to ascertain

whether good cause existed for the filing of the affidavit on the morning of trial rather than on November 17, 1961, or during the intervening days".

Appellee does not further argue the timeliness of the affidavit but on Page 6 of its brief, Appellee quotes from the record [RT. 2,3][1] the statement of Appellant's Attorney, Leonard B. Hankins, which sets forth therein the fact that only two conferences were had with the Honorable Judge Gus Solomon, one on Saturday and the other on Monday preceding the day of trial, November 21, 1961, a Tuesday. We therefore submit that Appellee, by its silence on this issue and its quotation of facts in support of Appellant's position as contained in his brief [Ap. 10][2] is conceding this issue to Appellant and we therefore will not discuss this point further herein.

In its argument Appellee, on Page 12 of its Brief, states that the statement attributed by Appellant to the Honorable Judge Solomon, "You are the one that is going to the penitentiary", is not supported by the record. Appellee again quotes the colloquy taken from the record [RT. 2,3] between Judge Solomon and Appellant's attorney on Pages 12 and 13 of said Brief which concludes, "The Court: Mr. Hankins, as I told you

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1. R.T. denotes Reporter's Transcript;
2. Ap. denotes Appellant's Brief

earlier, the motion is denied".

The Court's statement at this point shows clearly that the affidavit in question had been discussed at a time prior to the appearance of counsel in the Court Room and it follows that no reporter was present when the extrajudicial remark attributed to Judge Solomon was made as otherwise Appellant would certainly have designated that portion of the record for review. Appellant therefore submits that where a Trial Court alludes to extrajudicial discussions in its ruling on a motion before it, that it is proper for an Appellant in a criminal case to quote the content of such discussion even though such quotation is offered for the first time on appeal.

Appellant has failed to find any authority in support of, or against the argument offered above and therefore begs this Court to consider said argument and the issue presented as one of first impression.

Appellee's Brief at Page 11, cites the case of Scott v Beam, 122 F2d 777 (10th Cir. 1941) wherein it was held that the fact a judge conferred with the Assistant United States Attorney in the absence of other attorneys in the case of itself was not a fact showing bias or prejudice.

Appellant submits that his conclusion as to the existence of bias or prejudice against him on the part of Judge Solomon was not based on a single instance but was arrived at after

Appellant learned that the Honorable Judge Solomon had so conferred with the United States Attorney and thereafter was told by said Judge, "You are the one that is going to the penitentiary" [Ap. 10].

Thus Appellant's position appears clearly to fall within the rule of Nations v. U.S., 14 F2nd 507, C.C.A. Mo. 1926, cited in Appellant's Brief [Ap. 11], providing for transfer of a cause to another judge where a defendant is informed and believes that persons connected with the government and having special interest in the prosecution had communicated to the trial judge what they claimed to be facts and circumstances connected with the charge made in the indictment, as a result of which said judge had formed and expressed an opinion that defendant was guilty.

Further, Appellee's Brief is silent as to a denial of the fact of a conference held by the Assistant United States Attorney with Judge Solomon prior to the day of trial, or the statement attributed to said Judge by Appellant. Rather, Appellee seeks to dismiss one of these facts because it does not happen to be referred to in the record on review and the other because it is not sufficient when standing alone.

Appellee is also silent as to an explanation of the matters discussed with Judge Solomon at the conference held in the absence of Appellant's attorney and yet apparently takes the position in its Brief that there is no basis in fact for a

conclusion as to personal bias or prejudice arising in the mind of Appellant. [Br.9][3]. As to members of the legal profession, familiar with the integrity of the judiciary and fellow counsel, such silence is understandably acceptable. However, the layman's mind, particularly when housed in the being of a defendant to a criminal charge, can hardly be expected to react to such conduct on the part of the Trial Court in the same manner as that of the legal practioner. This is especially true when coupled with such acts by a Judge as a tone of voice, a look or a jesture, that are not capable of factual description but all of which, when considered with known facts, tend to create a mental picture of adversity to one's cause.

Appellant therefore reiterates the position taken in his main Brief [Ap. 11] that instant case falls within the purview of Knapp v. Kinsey, 232 F2d 458, holding that bias or prejudice on the part of a judge may exhibit itself by acts or statements and that as a result the Trial Court erred in failing to disqualify itself.

Appellee's Brief at Page 10, cites the case of Henry v. Speer, 201 Fed. 869 (5th Cir. 1913) in support of the proposition that a sustaining of the affidavit in question would clear the way for "unfettered court shopping" by defendants. A review of the history of the cited case fails to reveal that

3. Br. denotes appelle's Brief

it has ever been cited in other cases for the point attributed to it. Further, a review of the case failed to reveal to the writer that said case was decided on the issue of the claimed rule and in any event the clear wording of the code section involved, 28 U.S.C. 144, limits a defendant to only one such affidavit as is involved herein. We therefore submit that the use of the word "unfettered" is an extreme expression and not truly involved in the point on this appeal.

Appellee, again on Page 10 of its Brief, cites the case of Williams v. Pierce County Board of Commissioners, 267 F2d 866 (cited as 966), (9th Cir. 1959), in support of its contention that affidavits which fail to state facts are insufficient. While a reading of the cited report reveals the quotation to be accurate, yet the report also reveals that the affidavit ruled upon is not contained therein. It is therefore not possible to state whether the affidavit in the cited case was comparable in content with that of the case on appeal, or whether it merely alleged the defendant's mental image of the Trial Court. Instant affidavit is therefore distinguishable from the cited case since Appellant herein alleged the fact of a conference between Judge Solomon and the Assistant United States Attorney in the absence of defense counsel and Appellant's belief that the Honorable Judge Solomon had a personal bias or prejudice against him. The affidavit is further supplemented by the remarks of Appellant's counsel

[Br. 12] when in response to Judge Solomon's request he stated, ".....and his being present and knowing what has transpired....", thus showing that Appellant had a personal knowledge of events which led to his mental belief.

We therefore submit that instant case cannot be compared with Williams v. Pierce County Board of Commissioners, supra, in the absence of the affidavit there involved and further inasmuch as the report of said case states that the affidavit therein was not properly executed and therefore could not be considered as such.

Appellee further cites Johnson v. United States, 35 F2d 355, (D.C.W.D. Wash. 1929), [Br. 13] in support of its contention that an affidavit of bias should contain the time, place, occasion of, and the Judge's expressions, leading to the conclusion of personal bias or prejudice. A review of the history of the cited cases reveals only five (5) instances where it has been cited, in one of which the writer failed to find mention of the case and in another it was not cited for the point attributed to it by Appellee herein.

As opposed to the above case, Appellant offers as authority the case of Nations v. U.S., C.C.A. Mo. 1926, 14 F2d 507, cited in his main Brief [Ap. 11], as controlling on the issue of the degree of exactness required in an affidavit of bias. In said case in commenting on the need for exact quotations, time and place of utterance, the Court stated at

Page 509:

> "Such details, if set out, might betoken verity in the affidavit if it were subject to attack. The affidavit, however, is not subject to attack, but is to be taken as true. And in any event the judge against whom the affidavit is filed cannot pass upon the truth or falsity of it. Berger v United States, Supra. The affidavit clearly states that defendant has received certain specified, definite information, which defendant believes to be true. If true, it would lead to the reasonable conclusion that the judge had a bias or a prejudice against defendant. Facing a false affidavit stand the penalties of perjury. Facing a false certificate of counsel stands the penalty of disbarment. The affidavit and the certificate are to be taken at their face value."

Appellant herewith reiterates his position taken in his main Brief [Ap. 12], that the ruling of Judge Solomon was not based on his conclusion as to the legal sufficiency of the affidavit, but rather because he believed it had been submitted only for purposes of delay.

Appellee's Brief makes no mention of Appellant's third issue [Ap. 13] and therefore no further discussion of this

point will be undertaken here.

For the foregoing reasons as well as those set forth in the Appellant's main Brief, it is respectfully submitted that the decision of the District Court of the United States be reversed.

Respectfully submitted,

LEONARD B. HANKINS

and

JAMES L. HAY

Attorneys for Appellant.

By: S/ Leonard B. Hankins

CERTIFICATE OF SERVICE

It is hereby certified that service of three (3) copies of this Brief has been made on opposing counsel by mail in accordance with the rules of the United States Court of Appeals for the Ninth Circuit.

Dated: May 28, 1962

S/ Leonard B. Hankins

Leonard B. Hankins